FILED

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 170

MICHAEL ZAFFARANO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

to the United States Court of Appeals
for the Ninth Circuit

VINCENT HALLINAN,
CARL B. SHAFFER,
PATRICK SARSFIELD HALLINAN,
[redacted]
San Francisco, California

Attorneys for Petitioner.

Subject Index

	Page
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes, federal rules and regulations involved	4
Statement of the issues and the facts	4
Reasons for granting writ of certiorari	7
Conclusion	8

Table of Authorities Cited

Cases

	Pages
Barzone v. U.S., 11 L.Ed. 2d 11	7
Saunders v. U.S., 10 L.Ed. 2d 148	7
U.S. v. Behrens, 11 L.Ed. 2d 224	7

Statutes and Rules

18 United States Code:	
Rule 11	3, 4
Rule 32(a)	3, 4
Rule 32D	3, 4, 7
Section 2255	3, 5
Section 2314	4
28 United States Code, Section 1254(1)	2
Supreme Court Rules, Rule 19	2

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1963

No.

MICHAEL ZAFFARANO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

Comes now the petitioner above named through his counsel and prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on April 6, 1964. A timely petition for a rehearing was denied May 11, 1964.

OPINIONS BELOW

The opinion of the District Court for the Northern District of California, Southern Division (Honorable Oliver Carter, Judge) was not reported but appears in the form of a narrative which has been transcribed and constitutes a portion of the record on appeal. The opinion of the Court of Appeals for the Ninth Circuit is reported at 330 F. 2d 114. An earlier decision in the same case by the United States Court of Appeals appears in 306 F. 2d 707 (*Zaffarano v. United States*).

JURISDICTION

The opinion and judgment of the Court of Appeals for the Ninth Circuit were made and entered on April 6, 1964 and copies thereof are appended to this petition The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and under mandate of Rule 19, of the Supreme Court Rules.

QUESTIONS PRESENTED

This is a case involving the rules of criminal procedure affecting the voluntariness to plead guilty and the procedures to withdraw this plea of guilty any time prior to the imposition of sentence.

Question 1. Where the United States Court of Appeals has ordered the setting aside of a sentence and a hearing on the motion to withdraw a plea of

guilty, does the trial Court then have the right to deny the motion in the light of the specific language of Rule 32D, namely:

> "A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice a court after sentence may set aside the judgment of conviction *and permit* the defendant to withdraw his plea." (Emphasis added.)

2. Where the defendant was orginally denied the right of allocation (Title 18, Rule 32(a)) and where the Court did not originally inquire into the voluntariness of the plea of guilt (Title 18 U.S.C. Rule 11) and when it was necessary for the defendant, petitioner herein, to institute proceedings under Title 18 U.S.C. Section 2255 and then to proceed on appeal to the United States Court of Appeals on two separate occasions merely to obtain the right to stand trial for the charges, and where in the face of all this, the record shows by uncontradicted evidence that the plea of guilt was induced as a result of a "bargain and sale" transaction between the attorneys for the parties, is it not an abuse of discretion and a violation of the sanctity of the proceedings to deny the motion to withdraw his plea of guilt.

3. It is a basic constitutional right—the right of trial by jury—to deny a defendant in a criminal trial merely because the judge in this case presumed that prejudice resulted from the years of litigation necessary to protect the rights of the petitioner and

especially where no showing of prejudice had been made by affidavit or by evidence. In other words, is it a ground for denial of trial by jury that the government might be prejudiced since a long period of time elapsed between the alleged crime and the trial and especially when during the bulk of this period of time, the petitioner was in the United States Prison.

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED

This case deals primarily with the meaning and procedures of the following rules of criminal procedure as set forth in Title 18 of the United States Code, namely, Rule 11, Rule 32, paragraph (a) and paragraph (d).

STATEMENT OF THE ISSUES AND THE FACTS

The petitioner herein was arrested in San Francisco in the Spring of 1959 for an alleged violation of 18 U.S.C. Section 2314. This arrest was made without warrant and a subsequent search of the premises where he was residing allegedly turned up evidence of the stolen securities. At the first hearing (except for routine arraignment) and at the outset of the hearing, it was announced by the United States Attorney that the defendant wished to plead guilty to one charge of the indictment. The ultimate hearing indicated that there had been discussions between the

United States Attorney and privately retained counsel for defendant and this fact plus the knowledge that the United States Attorney had at the outset of the proceedings plus the plea which he made to the sentencing judge that leniency be shown lends credence to the claim of petitioner that he was induced to plead guilty by a promise of leniency which promise was not kept. Moreover, it is uncontradicted evidence that he was misadvised by his attorneys as to the maximum sentence that could be imposed under the indictment. Without inquiring as to the voluntariness of the plea, the judge accepted the plea and then without allowing the defendant a right of allocution, sentenced him to the maximum sentence which could be made under the indictment, namely, ten years in prison.

Some time later (and the defendant logically explains this delay by pointing to proceedings in State Courts that required his full time and attention), a petition for release was filed under 18 U.S.C. 2255 and this petition was granted to the extent that the sentence heretofore imposed was set aside. The defendant was denied an opportunity to support the charges that he had made that the plea was induced by promises and other forms of coercion. On the date when he made these charges, he himself was unrepresented but there were present in the Court as witnesses called by the Court the United States Attorney and the privately retained counsel and neither of these officers of the Court so much as whispered a denial of the truth of these charges then and there

made. Ultimately, the United States Court of Appeals reversed the sentence and sent the matter back for a hearing on the motion to withdraw the plea of guilt which hearing was held before the Honorable Judge Carter. His decision to deny the motion was based on the question of delay and laches and upon the fact that the defendant had not "sustained the burden of proof". This contention was upheld by the United States Court of Appeals in the decision for which certiorari is now sought.

The Court's reasons and reasoning is scrupulously set forth in his oral remarks appearing in the Reporter's Transcript of the proceedings and the Court has indicated that he desires these remarks to be treated as "findings of fact and conclusions of law" unless formal findings were prepared by the United States Attorney. No such formal findings were prepared so the Court's views as to reasons and to basis for discretionary acts are ascertainable.

It is clear that the Court treated this motion as one made after judgment had been imposed although it was a motion made before judgment. It was clear that the defendant's constitutional and statutory rights had consistently been violated and negated throughout these whole proceedings. It appears that as a matter of law, there is no question that the plea of guilt was induced by the Court and counsel. How much more evidence need be produced to "satisfy the burden of proof" is hard to tell considering the public interest in guaranteeing the right to trial by jury and preserving the sanctity of the Courts.

REASONS FOR GRANTING WRIT OF CERTIORARI

Certiorari should be granted in this case because an important Federal question, namely, the meaning and procedures under the rules of criminal procedure and the sanctity of the Federal Courts in allowing a plea that is not the will of the defendant to stand, has been decided by a Court other than the United States Supreme Court.

The writ should also be granted because the United States Court of Appeals allowed it to stand. A decision of the lower Court which negates the meaning and import of Rule 32 (D) of Title 18 of the United States Code in that it allows a trial Court to throw the burden of proof upon a defendant who merely wants to stand trial on the charges and it uses as a basis for denying a defendant the right to a trial the fact that delay over which the defendant had no control and which was not his fault may have "prejudice" to the government, although no such showing appeared in the record.

The importance of the procedures involved in the application of the Federal rules in criminal procedures has been shown by a series of recent cases in this Court dealing with the sanctity of the sentencing procedure and the interest of the judiciary in protecting the integrity of the judicial system. Reference is made to cases such as *Barzone v. U.S.*, 11 L.Ed. 2d page 11, *Saunders v. U.S.*, 10 L.Ed 2d, page 148; *U.S. v. Behrens*, 11 L.Ed. 2d 224. It will be noticed that all three of these cases have been decided within the last twelve months. Apparently, the

trial Court and the United States Court of Appeals are not prepared to accept the sanctity of the sentencing procedure and to protect the integrity of the government.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
June 8, 1964.

VINCENT HALLINAN,
CARL B. SHAPIRO,
PATRICK SARSFIELD HALLINAN,
By CARL B. SHAPIRO,
Attorneys for Petitioner.

(Appendix Follows)

Appendix

United States Court of Appeals
for the Ninth Circuit

Michael Zaffarano, Appellant, vs. United States of America, Appellee.	No. 18,669

[April 6, 1964]

Appeal from the United States District Court
for the Northern District of California
Southern Division

Before: Hamley, Hamlin and Koelsch, Circuit Judges.

Koelsch, Circuit Judge.

On this appeal, the sole issue raised is the validity of an order of the District Court denying defendant's motion to withdraw his previously entered plea of guilty to an indictment charging him with transporting stolen securities in interstate commerce in violation of 18 U.S.C. § 2314. The case is before us for a second time. On the earlier appeal, [*Zaffarano v. United States*, 306 F.2d 707 (9th Cir. 1962)] we held that the defendant was entitled to a hearing, pursuant

to Rule 32(d) F.R. Crim. P., on his motion. We reversed the judgment and remanded the case to the District Court, with instructions to hold a hearing on defendant's motion, to reimpose sentence if the motion was denied or, in the alternative, to grant a new trial if the motion was granted.

Briefly restating and supplementing the facts, which appear at length in the opinion on the prior appeal, [*Zaffarano v. United States, supra*, 306 F.2d 707 (9th Cir. 1962)] it is seen that a three-count indictment was returned against Zaffarano and two others. Zaffarano, represented by counsel of his own choosing; entered a plea of guilty to Count I. Counts II and III were dismissed. Zaffarano was then sentenced to a term of ten years and committed to the custody of the Attorney General. After he had begun serving his sentence, pending state criminal charges in New York and California, both of which arose out of the same transaction alleged in the federal indictment, were respectively dismissed in California and concluded by a suspended sentence in New York. It was not until two and one-half years after his original sentencing, and after the disposal of the pending state criminal actions that the defendant moved to withdraw his plea of guilty, the denial of which is the subject of this and his prior appeal.

In present posture it appears that defendant's case has been fully presented to the District Court on remand: that a hearing was duly conducted: that defendant's points in support of his motion to withdraw his plea of guilty were fairly considered but decided

adverse to him, and that sentence was reimposed with credit given for time served. Defendant is now at liberty on bail, pending the outcome of this appeal.

Defendant's several contentions, some of which are inter-related and identical, will be treated by us under two headings sufficiently broad to answer all points raised.

He first contends that his plea of guilty was not freely and voluntarily made as a matter of law. He asserts his plea of guilty was secured by a promise of leniency made to him by the United States Attorney. This contention is utterly devoid of merit. In substance it is nothing but a reiteration of the arguments and assertions unsuccessfully urged on the District Court; moreover, defendant does not refer to any evidence in the record that in any way tends to show the findings of the court below lack support. Though the evidence was conflicting on this issue, there was substantial evidence to support the trial court's finding. *Rosewig v. United States*, 144 F.2d 30, 33-34 (9th Cir. 1944) *Cert. Din.* 323 U.S. 764. While it is true that leave to withdraw a guilty plea prior to sentencing should be freely allowed, [*Poole v. United States*, 250 F.2d 369, 400 (D.C. Cir. 1957); *Kadwell v. United States*, 315 F.2d 667, 670 (9th Cir. 1963)] the trial court has a wide discretion in passing on such a motion and the reviewing court will not disturb the trial court's ruling in the absence of an abuse of that discretion. [*Vasquez v. United States*, 279 F.2d 34, 37 (9th Cir. 1960)] particularly when, as here, the defendant did not allege his innocence of the offense

charged. *United States v. Norstrand*, 168 F.2d 481, 482 (2d Cir. 1948).

Defendant's final contention is that the District Court did not accord him the consideration on the hearing to which a defendant is entitled under Rule 32(d), because of the fact that his motion came long after a sentence (which had been set aside) was imposed upon him. He asserts the earlier sentence colored and controlled the disposition made by the trial judge on remand.

Again, defendant fails to meet his burden. It was proper, and we so hold, for the trial court in evaluating the defendant's testimony to consider both his delay in asserting the claim and the intervening events that took place, in addition to the fact that he was represented by competent counsel at the time the guilty plea was entered. *Cf. United States v. Harris*, 160 F.2d 507 (2d Cir. 1947). Finding no abuse of discretion, we affirm the judgment.

United States Court of Appeals
for the Ninth Circuit

Michael Zaffarano,	Appellant,	No. 18,669
vs.		
United States of America,	Appellee.	

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

The Cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered April 6, 1964.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	9
Conclusion	11

CITATIONS

Cases:	
Bone v. *United States*, 305 F. 2d 772, certiorari denied, 374 U.S. 503	10
Hoyt v. *United States*, 252 F. 2d 460	11
Poole v. *United States*, 250 F. 2d 396	11
Scott v. *United States*, 292 F. 2d 49, certiorari denied, 368 U.S. 879	10
United States v. *Moore*, 290 F. 2d 501, certiorari denied, 368 U.S. 837	11
United States v. *Nigro*, 262 F. 2d 783	11
United States v. *Roland*, 318 F. 2d 406	10, 11
United States v. *Swaggerty*, 218 F. 2d 875, certiorari denied, 349 U.S. 959	9
Vesquez v. *United States*, 279 F. 2d 34	11
Young v. *United States*, 302 F. 2d 511, certiorari denied, 371 U.S. 829	11
Statutes and rules:	
18 U.S.C. 371	2
18 U.S.C. 2314	2
18 U.S.C. 2315	2
F.R. Crim. P.:	
Rule 11	9
Rule 32(d)	10

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 170

MICHAEL ZAFFARANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 330 F. 2d 114. A previous opinion of the court of appeals is reported at 306 F. 2d 707.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1964, and a petition for rehearing was denied on May 11, 1964 (Vol. I).[1] The petition for a writ of certiorari was filed on June 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The record is in four volumes, to which reference will be made by their Roman numerals.

QUESTION PRESENTED

Whether the district court acted within its proper discretion in denying petitioner's motion to withdraw his plea of guilty made more than two years after its entry.

STATEMENT

Petitioner and one Potenza were indicted in the United States District Court for the Northern District of California for (1) the interstate transportation to California of travelers checks stolen in New York in violation of 18 U.S.C. 2314; (2) concealment of this stolen property in violation of 18 U.S.C. 2315; and (3) a conspiracy to commit these offenses in violation of 18 U.S.C. 371.

On June 19, 1959, petitioner and his co-defendant Potenza appeared with counsel of their own selection: Mr. Edelbaum, their New York counsel, and Mr. Ehrlich, their San Francisco counsel. The government attorney, Mr. Constine, stated that the petitioner wanted to plead guilty to count 1 and that Potenza wanted to plead guilty to count 3, the conspiracy count, after which the government would move to dismiss the other two counts. At the late Judge Goodman's direction, the clerk then entertained guilty pleas from petitioner and Potenza (Vol. III, transcript of June 19, 1959, pp. 2–3). An F.B.I. agent testified as to the details of the robbery in which the travelers checks were stolen, the apprehension of petitioner and Potenza, and the pendency of New York criminal charges against them resulting from this robbery (*id.* at 4–10).

At a continuation of the proceedings on July 28, 1959 (Vol. III, transcript of July 28, 1959, p. 18), government counsel agreed with Mr. Ehrlich that the defendants had saved the government considerable expense by their guilty pleas. He explained that the three counts in the indictment resulted from the same act, but that there was a difference between the culpabilities of each defendant so that different pleas were accepted (*id.* at 23). Judge Goodman stated: "Well, I take everything in consideration you gentlemen have said, but nevertheless the judgment of the Court will be that the defendant Potenza serve a term of five years in Federal prison, and the defendant Zaffarano will serve a term of 10 years in Federal prison." The other two counts were dismissed (*id.* at 24).

On October 13, 1961, petitioner filed a "Motion to Vacate Judgment and Sentence" alleging that he had been denied the right of allocution before imposition of sentence (Vol. I). A hearing was held on October 25, 1961. At the hearing, Judge Wollenberg vacated and set aside the sentence imposed by Judge Goodman on the ground that petitioner had not been granted the right of allocution prior to the imposition of sentence (Vol. III, transcript of October 25, 1961, p. 4). On October 30, 1961, when asked if he had anything to say before resentencing, petitioner stated that his plea of guilty had not been voluntarily entered but had been induced by a deal between the attorney who represented petitioner at that time and the Assistant United States Attorney (Vol. III, tran-

script of October 30, 1961, pp. 3-7). Following this statement and prior to resentencing, petitioner moved the court for leave to withdraw his plea of guilty. The motion was denied, whereupon petitioner gave oral notice of appeal from such denial. The court then sentenced petitioner to imprisonment for ten years on count 1, with credit for the time served after July 30, 1959 (*id.* at 20–22). The court of appeals reversed the judgment of October 30, 1961, with directions that a hearing be held by the district court in connection with the charges made by petitioner in his motion for permission to withdraw his guilty plea. *Zaffarano* v. *United States*, 306 F. 2d 707 (C.A. 9).

At the hearing before Judge Carter, petitioner testified that at the time of arraignment on May 14, 1959, he told Mr. Ehrlich that he was going to plead not guilty, but Mr. Ehrlich said that he ought to wait for his attorney from New York (Vol. II, p. 42). After Mr. Edelbaum arrived from New York on June 18, petitioner discussed with him the possible sentences upon the federal, California, and New York charges against himself; and petitioner said that he did not want to plead guilty to the federal charges (Vol. II, pp. 48–51, 54–56). Mr. Edelbaum said that, if petitioner did plead guilty, he would ask the court to show leniency (Vol. II, p. 57). The decision to plead guilty was made on the morning of June 19, 1959, at Mr. Ehrlich's office, and the guilty plea was entered on that date (Vol. II, pp. 44–45). Mr. Ehrlich and Mr. Edelbaum told petitioner that if he would plead guilty, some leniency would be shown on the federal

charges and California would drop its charges against him (Vol. II, pp. 46, 52). Both attorneys told petitioner that the court would see that he got only 28 or 36 months on the federal charges (Vol. II, pp. 80–81).

Petitioner further testified that on July 28, 1959, he appeared with Mr. Ehrlich for sentencing (Vol. II, p. 86). Immediately after the 10-year sentence was announced by Judge Goodman, petitioner told Mr. Ehrlich that he wanted to withdraw his plea. After petitioner had been taken to the bull pen, he again told Mr. Ehrlich that he wanted to withdraw his plea since no leniency had been shown (Vol. II, pp. 93–95). Mr. Ehrlich left and returned in about 15 minutes with government attorney Constine, who stated to petitioner, "Look, I just left Judge Goodman. You are not going to do over 26 or 28 months, so don't worry about it. If you withdraw your plea you are only going to harm yourself, that's that" (Vol. II, pp. 95–96). Within 60 days after sentence, petitioner wrote Judge Goodman asking that he modify the sentence but the judge refused to do so (Vol. II, p. 99).

Mr. Edelbaum testified that at the conference in Mr. Ehrlich's office on June 19, 1959, Mr. Ehrlich stated that the case could not be defended successfully, and that he felt that, if petitioner and Botenza pleaded guilty, he could persuade the state authorities to dismiss the charges pending against him. Mr. Ehrlich said that he would have the government attorney call to the court's attention the fact that these men, by pleading guilty, would be saving the government the expense of a trial. Mr. Ehrlich sug-

gested that Mr. Edelbaum should bring to Judge Goodman's attention the severe punishment petitioner and Potenza might face if they went to trial on the New York indictments (Vol. II, pp. 118–120). Mr. Edelbaum further testified that neither he nor Mr. Ehrlich indicated that there was an agreement as to the sentence petitioner would get if he pleaded guilty (Vol. II, pp. 120, 136).

Mr. Ehrlich testified that from what government attorney Constine and his clients had told him, it would be a waste of time to try to defend the case, and he so informed his clients at their conference with Mr. Edelbaum. Mr. Ehrlich testified that during this conference he did not at any time state that he would obtain a certain sentence for petitioner (Vol. II, p. 165). Mr. Ehrlich denied that on the date of sentencing (July 28, 1959) petitioner while in the bull pen told Mr. Ehrlich that he wanted to withdraw his plea of guilty (Vol. II, p. 172). Mr. Ehrlich also denied that either he or government attorney Constine told petitioner that Judge Goodman had said he would "do no more than 26 or 28 months" (Vol. II, pp. 172–173).

Government attorney Constine testified that he discussed with Mr. Ehrlich the nature of the government's case as shown by the search warrants which had been issued (Vol. II, p. 142). Mr. Constine advised Mr. Ehrlich that if was the policy of his office to make no recommendation as to the sentence, that being a matter entirely for the accused, the court, and the probation office (Vol. II, p. 144). Mr. Constine said

that he had no power to dismiss the California charges against petitioner, but that the state district attorney could dismiss them (Vol. II, pp. 144–145).[2] Mr. Constine told Mr. Ehrlich that he would advise the court that pleas of guilty would save the government considerable expense (Vol. II, pp. 146–147). On July 28, 1959, following the sentencing proceedings, Mr. Ehrlich, in petitioner's presence, asked Mr. Constine to step over to the bull pen. Mr. Constine stated that it was the policy of his office to make no recommendation for or against parole. When petitioner asked whether the judge would reconsider the 10-year maximum sentence, Mr. Constine said that petitioner had 60 days in which to apply for modification and that he should attend to that with Mr. Ehrlich (Vol. II, pp. 148–150). Mr. Constine denied that he told petitioner, "I spoke to Judge Goodman and he says that you will do no more than 26 or 28 months" (Vol. II, pp. 151–152).

On February 15, 1963, in denying petitioner's motion to withdraw the plea of guilty, the court found that (1) petitioner was not told by anyone that he would be given leniency by the court and the government attorney to... him that they would attempt to present the matter so that the court could exercise leniency if it so desired; (2) neither Mr. Ehrlich nor Mr. Constine guaranteed petitioner that a sentence

---

[2] Subsequently, between the time of petitioner's original plea and his motion to withdraw it, the California charges against petitioner were dismissed and he was given a suspended sentence in New York (Vol. II, pp. 247, 145, 136–137; Vol. III, transcript of October 30, 1961, p. 11).

of 26 to 28 months would be imposed; (3) petitioner did not, immediately after sentence was imposed, state to anyone that he wanted to withdraw his plea of guilty; and (4) petitioner was advised by Mr. Constine that he could ask to have his sentence modified, but he wrote the court only to modify his sentence, not to withdraw his plea of guilty (Vol. IV, pp. 12–14). The court then denied petitioner's motion as an "afterthought" after his sentence had been vacated (Vol. IV, pp. 20–22):

> [N]o word about his desire to withdraw his plea was communicated to the Court until after he disposed of these very serious state charges pending against him. In this respect, in his own statement made to Judge Wollenberg, Zaffarano indicates that this aspect was considered by the New York courts in making the disposition that was made in New York, where a suspended sentence was given because he already had a stiff federal sentence hanging over him and, of course, the California charges were dismissed because the matter insofar as the prosecution was concerned was being taken care of in the federal courts, and to this extent the State of California, knowing the serious charges that were pending in New York and that he had pleaded guilty in the federal court and awaiting a federal sentence, dismissed the charges.
>
> Now, all these circumstances would tend to indicate Mr. Zaffarano in this situation has developed a theory of getting around the federal case and he has manufactured a story which will fit him within the federal rules so that the

> plea of guilty will be set aside and he can proceed then to trial after the case is five years old, and therefore the situation is one which, it seems to me, that the Court should not accept the motion and should and therefore I will deny the motion to set aside the plea, and will proceed to judgment and sentence.

The court of appeals affirmed the judgment of the district court.

ARGUMENT

The facts which are summarized in the Statement amply refute petitioner's contention that the district court abused its discretion in denying the motion to withdraw the plea of guilty. Even though at the time of the plea of guilty the court did not directly inquire of petitioner as to voluntariness, the surrounding circumstances were sufficient to indicate that the plea was voluntary. Petitioner appeared with two highly experienced attorneys of his own choosing who did not question the government's statement that petitioner wanted to plead guilty to count 1. Petitioner, who was no novice to criminal proceedings, expressly stated that he wanted to enter this plea. No particular ritual is necessary for compliance with Rule 11, F.R. Crim. P., so long as the court can reasonably infer from the attendant circumstances that the plea is made voluntarily and with understanding of the nature of the charge. *United States* v. *Swaggerty*, 218 F. 2d 875, 879 (C.A. 7), certiorari denied, 349

His counsel admitted that prior to the entry of his plea of guilty he had had "experience in both state and federal courts" (Vol. II, p. 101).

U.S. 959; *Bone* v. *United States*, 305 F. 2d 772, 773 (C.A. 8), certiorari denied, 374 U.S. 503.

A plea of guilty may be vacated after sentence only "to correct manifest injustice" (Rule 32(d), F.R. Crim. P.), and the district court has broad discretion in making this determination (*e.g.*, *United States* v. *Roland*, 318 F. 2d 406, 409 (C.A. 4); *Scott* v. *United States*, 292 F. 2d 49, 51 (C.A. 6), certiorari denied, 368 U.S. 879). Petitioner's motion to withdraw his plea of guilty was made more than two years after his plea and original sentencing. While the original sentence was set aside on the ground that petitioner was denied the right of allocution, it is surely not a complete nullity. It would be exalting a technicality to say that petitioner's motion to withdraw his plea before he was resentenced should be treated as a motion before sentencing. Indeed, the circumstances in this case are particularly strong for allowing withdrawal of the plea only on the basis of manifest injustice because, as a result of petitioner's delay, the government's case has long since become stale.

There can be little doubt that petitioner failed to show that setting aside the plea was needed to correct manifest injustice. Petitioner has never asserted that he is innocent of the federal crimes.[1] His claim that his plea was induced by promises was refuted by his counsel and not believed by the trier of fact.

In any event, even if petitioner's motion could be deemed the equivalent of one made to withdraw a

[1] In one of petitioner's exhibits he admitted complicity in the related New York charges (Vol. II, pp. 271, 269).

plea of guilty before sentence, petitioner has shown no reason for withdrawal of the plea. While withdrawal before sentence normally is allowed freely (see *Poole* v. *United States*, 250 F. 2d 396, 400 (C.A. D.C.); *United States* v. *Roland, supra*), withdrawal is not a matter of right, and discretion rests with the district court (*United States* v. *Nigro*, 262 F. 2d 783, 787 (C.A. 3); *Vasquez* v. *United States*, 279 F. 2d 34, 37 (C.A. 9); *Hoyt* v. *United States*, 252 F. 2d 460, 462 (C.A. 10)). The district court here plainly did not abuse this discretion when it refused to allow petitioner's withdrawal of the plea after a delay of more than two years when the plea was deliberately entered on the advice of experienced counsel of his own selection. See *Young* v. *United States*, 302 F. 2d 511 (C.A. 1), certiorari denied, 371 U.S. 829; *United States* v. *Moore*, 290 F. 2d 501 (C.A. 2), certiorari denied, 368 U.S. 837.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HEBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JULY 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964